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ABSTRACT

Beginning with the original executive order in 1986, drug-free workplace legislation has expanded its boundaries to include workers in private companies and state and local agencies and virtually all U.S. colleges and universities. This monograph reviews the Drug-Free Workplace Act of 1988 and its various implementing regulations from the standpoint not only of what the Act contains but also for what it omits. Noting that colleges and universities must comply if they accept funding under any federal grant or cooperative agreement, regardless of dollar amount, or federal contract of $25,000 or more, it spells out recipients' obligations to: (1) publish and circulate an anti-drug statement; (2) establish a drug-free awareness program; and (3) take certain steps to deal with employees convicted of drug-related, work-related crimes. The publication also notes that federal funding agencies can impose sanctions on contractors or grantees who file false certifications, fail to carry out measures defined by the terms of their contracts, or tolerate an unacceptably high employee conviction rate. Also briefly covered are the Department of Defense rules on the "drug-free work force." Appended is the text of Subtitle D of the Drug Free Workplace Act of 1988. (Contains 19 reference footnotes.) (CH)

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THE PUBLICATION SERIES

Complying with "Drug-Free Workplace" Laws on College and University Campuses

LAWRENCE WHITE

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National Association of College and University Attorneys

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Introduction

Shortly before Election Day in 1986, Commander-in-Chief Ronald Reagan opened a new offensive in the war against drug abuse. Declaring that "[d]rug use is having serious adverse effects upon a significant proportion of the national work force," the President coined a new phrase—the "drug-free workplace"—and ordered the federal government, as the largest employer in the nation, to develop a comprehensive plan for eradicating illegal drug use by federal employees through the adoption of preventive programs in each department and agency of the executive branch.[1]

President Reagan's 1986 order marked the federal government's first formal effort to link drug abuse with diminished worker productivity.[2] That link became the justification for increasingly aggressive efforts to enlist employers in the national battle against illegal drug use. Originally limited to workers at federal agencies, the drug-free workplace has now expanded its boundaries to include workers at thousands of private companies and state and local agencies that contract with or receive grants from the federal government, including virtually all the nation's colleges and universities.

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1. "Drug-Free Federal Workplace," Exec. Order No. 12564, 3 C.F.R. § 224 (1987), *reprinted in* 1986 U.S. CODE CONG. & AD. NEWS B50.

2. One widely cited study prepared in 1984 by the Research Triangle Institute in North Carolina estimated that drug abuse costs American businesses $33 billion annually in lost productivity. Other studies show that as many as twenty percent of American workers use illegal drugs, and that workers who use illegal drugs are involved in four times as many workplace accidents and receive three times as much in employer-subsidized health benefits as nonusers. The methodology used in these studies has been severely criticized. *See* "Boardroom Vice Squads?," 20 NAT'L JOURNAL 1680, 1682 (June 25, 1988).

Lost worker productivity due to drug abuse pales in comparison to lost worker productivity caused by alcohol. A 1987 study by the United States Department of Health and Human Services estimated that American businesses lose $66 billion annually due to alcohol-related losses in worker productivity.

Enacted November 18, 1988, the Drug-Free Workplace Act of 1988[3] requires applicants for federal funds to certify, as a precondition for the award of a contract or grant, that they will undertake certain steps to prevent illegal drug use in the workplace by employees who are directly engaged in federally sponsored work. To ensure uniformity in the Act's application by the more than three dozen federal departments and agents that award contracts and grants, Congress ordered the Office of Management and Budget to promulgate government-wide implementing regulations. OMB responded on January 31, 1989 by publishing two detailed sets of regulations, one for federal contracting activities and one for federal grants.[4] This pamphlet is principally devoted to an examination of the scope and applicability of the Drug-Free Workplace Act and OMB's implementing regulations.

The Drug-Free Workplace Act is as notable for what it omits as for what it contains. Three omissions in particular are worth highlighting at the outset. First, as we shall see in more detail below, the Act imposes no obligation on a contractor or grant recipient to control or prevent drug abuse *outside* the workplace. As its name implies, the Drug-Free Workplace Act aims at eradicating work-related drug abuse. It does not require employers to levy sanctions for recreational or off-duty drug use (although it does not prohibit such sanctions either).

Second, to the relief of many employers who watched anxiously as the legislation made its way through Congress last year, the Act does not mandate any kind of employee drug testing.

Third, to the chagrin of those genuinely concerned about the social and human costs of chemical dependency, the list of drugs to which the Act applies excludes alcohol—

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3. Pub. L. No. 100-690, Title V, Subtitle D, 102 Stat. 4304, codified at 41 U.S.C. §701 *et seq.* (1989 Cum. Supp.). The relatively brief text of the Drug-Free Workplace Act is reproduced as an appendix at the end of this pamphlet.

4. "Governmentwide Implementation of the Drug-Free Workplace Act of 1988," 54 Fed. Reg. 4646-71 (Jan. 31, 1989).

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although, again, the Act would not necessarily prohibit a college or university from including alcohol abuse within the parameters of its drug-free workplace policy if it had the determination and resources to do so.

In addition to the Drug-Free Workplace Act of 1988, this pamphlet addresses another, potentially more troublesome development affecting the liability of employers for drug abuse by their employees. On September 28, 1988, the Department of Defense (DOD) published its own rule on the "drug-free work force."[5] The DOD rule applies to a smaller universe of potential federal fund recipients—those contracting or seeking to contract with DOD to perform classified research or provide other national security-related products or services. But, in contrast to the requirements of the Drug-Free Workplace Act and OMB regulations (with which most colleges and universities will have no significant difficulty complying), the DOD rule may pose nettlesome compliance problems. Unlike the Drug-Free Workplace Act, which invites the employer's monitoring and enforcement activities to extend no farther than the front door of the workplace, the DOD rule makes employers accountable for any drug involvement by employees, whether work-related or not. The DOD rule, in addition, contains mandatory employee drug testing requirements. The provisions of the DOD rule are addressed in the concluding section of the pamphlet.

The Drug-Free Workplace Act of 1988 and Implementing Regulations

At the heart of the Drug-Free Workplace Act are two long sections, one covering contractors (section 5152), the other grantees (section 5153). The two sections closely parallel one another. Each begins by describing who is covered by the Act's substantive provisions.

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5. "Department of Defense Federal Acquisition Regulation Supplement: Drug-Free Work Force," 53 Fed. Reg. 37763–65 (Sept. 28, 1988). The DOD interim rule is also reproduced as an appendix hereto; but please see note 16, *infra*, before reading it.

Each then requires applicants for federal funds to certify, as part of the application process, that they will undertake certain measures prescribed in the Act. And each section ends with a long description of the penalties the federal funding agency may levy for false certification or failure to honor the terms of the certificate. In the narrative that follows, one may assume in the absence of specific differentiation that contracts and grants are treated alike under the Act and implementing regulations.

Scope of Coverage

In general, a college or university must comply with the certification requirement in the Drug-Free Workplace Act if any department, division, or other discrete academic or administrative unit receives or applies for—

- Funding under any federal *grant* or cooperative agreement, *regardless of dollar amount;* or
- Any federal *contract of $25,000 or more* (unless the contract is to be performed entirely outside the territorial limits of the United States).

The Act applies only to contractors and grantees, not subcontractors or subgrantees. It applies only to direct receipt of federal funds, not to third-party reimbursement schemes (such as Medicare payments to university hospitals or certain forms of privately guaranteed loans). These limitations notwithstanding, the Act's funding thresholds are so low that it applies inclusively to virtually every grant and contract a college or university is typically awarded by a federal funding agency.

The Act does not, however, necessarily cover the entire institution if the award goes to a discrete academic department or administrative unit. The Act defines contractor and grantee as "the department, division, or other unit . . . responsible for the performance under the" contract or grant (section 5157(6), (7)), and the Act allows sanctions to be imposed only against those "contractors" and "grantees," not the larger institutions of which they may be units. In its government-wide imple-

menting regulations, OMB announced its "inten[tion], where appropriate, to focus on the 'department, division, or other unit' " in determining where sanctions should be aimed, but then invited some confusion by stating:

> On the other hand, where it is appropriate, in the context of a particular Federal grant program, to view the entire grantee organization as responsible for the implementation of drug-free workplace requirements under this rule, the entire grantee organization could be subject to sanctions. [54 Fed. Reg. at 4949.]

Although the language of the Act is facially inconsistent with OMB's construction, OMB takes the position that a federal funding agency may impose sanctions on an entire college or university if that institution has chosen to implement the requirements of the Act on an institution-wide basis (as most research universities seem to be doing). Given the unmistakable program-specific thrust of the Act, OMB's construction may raise provocative enforcement questions under the reasoning of the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984).

The Act contains distinct certification requirements for contractors or grant recipients who are "individuals" rather than institutional entities, but these requirements are largely irrelevant in the college or university context where sponsored research is rarely undertaken in an individual's name. The OMB regulations, in fact, make it clear that a "principal investigator" will not be required personally to provide a drug-free certification unless "the grant is awarded directly to the investigator (as distinct from being awarded to a university or other organization)." [OMB Regs., 54 Fed. Reg. 4946, 4948 (Jan. 31, 1989).][6]

Congress did not give the Act retroactive effect. It therefore applies only to contracts and

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6. The regulatory definition of "grant" excludes veterans' benefits paid to individuals, and also excludes "technical assistance which provides . . . loans [and] loan guarantees. . . ." 54 Fed. Reg. at 4951. Although the question has still not been resolved by the Department of Education, it would appear that students holding positions under the federal work-study program would be covered by the Act and would have to provide individual certification in accordance with section 5153(a)(2).

grants awarded on or after March 18, 1989, the Act's effective date. Contractors and grantees whose awards predate March 18 will not be required to provide drug-free certifications in order to continue receiving their awards.

The OMB regulations, however, create one exception. If a contract entered into before March 18 is significantly modified at any time after that date, then the contractor will be asked at the time of modification to provide a certificate and to comply with the other requirements of the Act. OMB regulations define a significant contract modification as one creating a "new commitment" not contained in the existing contract. (54 Fed. Reg. at 4946.)

Recipients' Obligations

The Drug-Free Workplace Act obliges every applicant for a federal contract or grant to execute a standard-form certificate as part of the solicitation or grant application. A separate certificate must accompany each bid or grant application.[7] The certificate commits the applicant, if it is awarded the contract or grant, to implement a seven-component program for the elimination of workplace-related drug abuse.

These seven components are listed in subparagraphs (A) through (G) in sections 5152(a)(1) and 5153(a)(1) of the Act. Subparagraphs (A) through (G) are identically worded in each section. As an exercise in legislative drafting, however, these critical subparagraphs leave much to be desired. Subparagraphs (A) through (G) are disorganized, involuted, and difficult to understand without a chart. For the purpose of clarity, therefore, subparagraphs (A) through (G) are reassembled below in more comprehensible fashion. (The letters in brackets correspond to the actual subparagraphs in sections 5152(a)(1) and 5153(a)(1).)

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7. State colleges and universities, however, can take advantage of a simplified certification procedure. If a state institution is defined by the statutory or common law of the forum state as an "agency" of state government, then it may make a single annual certification to each federal agency from which it obtains grants. 54 Fed. Reg. at 4949. The simplified "state agency" procedure appears to apply only in the grant context—not to contracts.

The Act requires the recipient of federal funds to—

- *Publish and circulate an anti-drug statement.* The statement must explicitly notify employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited "*in the workplace*," and must specify the penalties levied against any employee who violates its terms.[A] The statement must also put employees on notice that, as a condition of employment under the contract or grant, they are expected to abide by the terms of the statement.[D] A copy of the statement must be given to each employee engaged in the performance of work under the contract or grant.[C]
- *Establish a drug-free awareness program.* The program must inform employees about the dangers of drug abuse *in the workplace*, the availability of any drug counseling, rehabilitation, or employee assistance programs for which employees might qualify, and the penalties for drug abuse violations occurring *in the workplace*.[B][8]
- *Take certain steps to deal with employees convicted of drug-related, work-related crimes.* Any employee who is convicted under a criminal drug statute for a violation occurring *in the workplace* must notify the employer within five days of conviction.[D] The employer then has ten days to notify the federal funding agency of the conviction and thirty days either to take "appropriate personnel action" or to require the convicted employee to participate satisfactorily in an approved rehabilitation program.[E,F][9]

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8. Most colleges and universities presumably satisfy this requirement already by virtue of the certification they must make under the 1986 Higher Education Amendments. "In order to be an eligible institution for the purposes of [participation in federal financial aid programs], an institution must . . . certify[that it has in operation a drug abuse prevention program that is determined by the institution to be accessible to any . . . employee . . . at the institution." 20 U.S.C. §1094(a)(10) (1988 Supp.).

9. The Act independently requires recipients to "make[a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F)." [G] It is unclear what this seventh and final requirement obliges recipients to do that they are not already required to do by subparagraphs (A) through (F).

Although the terms of the certification are long and appear to be detailed and complicated, the Act and implementing regulations are most striking for what they do not require.

First, the Act does not impose any obligation on a college or university (or other recipient) to control or prevent drug abuse outside the workplace. All the Act's critical definitions and proscriptions apply only to workplace-related conduct. So strikingly limited are the Act's substantive provisions that one could even argue, were one so inclined, that an employee who reported to work intoxicated or impaired because of after-hours recreational drug use would not be covered by the Act because that employee did not "possess" or "use" an illegal drug "in the workplace." (See sections 5152(a)(1)(A), 5153(a)(1)(A).)

Second, the Act and implementing regulations do not require drug testing in any form. The OMB regulations make that point explicitly. (54 Fed. Reg. at 4946.) No college or university that does not now have a random drug testing program will be required by the Drug-Free Workplace Act to start one—and that may be reassuring to many institutions, given the complexity of constitutional and statutory impediments to such programs and the intensity of opposition from some labor unions and other employee organizations.

Third, the Act does not require the employer to fire employees who are convicted of workplace-related drug crimes, nor does the Act oblige the employer to sponsor or subsidize drug rehabilitation programs. The Act requires only that the employer "impos[e] a sanction" for conviction, with "sanction" defined in the Act as an "appropriate personnel action . . . up to and including termination." (Section 5154(1).) The statute also authorizes the employer to refer a convicted employee to an approved rehabilitation program, but pointedly does not require the employer either to create its own programs or to subsidize the employee's treatment expenses. The OMB regulations go even further to hold a grant recipient harmless for the cost of rehabilitation programs: if the grantee incurs any costs in association

with the implementation of drug-free workplace programs, including subsidization of treatment expenses, those costs may be taxed against the federal funding agency by including them as allowable costs under the grant. (54 Fed. Reg. at 4950.)

Finally, in keeping with an inconsistency that seems to pervade many government efforts to control drug abuse, nothing in the Act or implementing regulations obliges a recipient of federal funds to include the two most widely abused substances—alcohol and tobacco—within the scope of institutional counseling and referral programs.

One of the most fascinating and potentially troublesome unanswered questions about the Drug-Free Workplace Act concerns the relationship between the sanction provisions in the Act and the prohibitions against handicap discrimination in the Federal Rehabilitation Act of 1973, as amended, 29 U.S.C. §§701–794 (Supp. V 1975), and related state laws. Many courts (construing Section 504 of the Rehabilitation Act) and state human relations agencies (relying on state analogs to the federal act) have defined drug addiction as a physical handicap and have classified drug addicts as "handicapped individuals" who cannot be sanctioned for the work-related manifestations of a drug abuse problem. *E.g., Ferguson v. United States Dep't of Commerce*, 680 F. Supp. 1514 (M.D. Fla. 1988). *Cf. Heron v. McGuire*, 803 F. 2d 67 (2d Cir. 1986).

Some potential confusion has been alleviated by another section of the Rehabilitation Act, which excludes from the definition of "handicapped individual" in Section 504—"any individual who is an alcoholic or drug abuser whose *current use* of alcohol or drugs prevents such individual from performing the duties of the job in question. . . ." 29 U.S.C. §706(7)(B) (emphasis added). Federal law, in other words, distinguishes between a "current use[r]" of drugs, who cannot invoke the Rehabilitation Act to prevent discharge or other sanction, and a recovered former addict, whose status as an ex-abuser cannot be used as a predicate for taking disciplinary action. Pre-

sumably, most drug abusers identified by employers under the Drug-Free Workplace Act would be current users who would have difficulty invoking the Rehabilitation Act as a shield against employment-related sanctions. But many state anti-discrimination laws do not contain the "current user" exclusion. It is entirely possible that a college or university could face an insoluble dilemma—if it took disciplinary action against a drug abuser, it would violate state handicap discrimination law, but if it failed to, it would run afoul of the Drug-Free Workplace Act.

A university attorney in a state with inclusively protective handicap discrimination laws should obviously be aware of that potential dilemma when fashioning a drug-free workplace policy that specifies what "personnel action" is "appropriate" under Section 5154(1) of the Drug-Free Workplace Act.

Sanctions

A federal funding agency can impose sanctions on a contractor or grantee only for—

- Filing a false certification;
- Failing to carry out any of the measures to which the contractor or grantee has committed itself under the terms of its certification; or
- Tolerating an unacceptably high employee conviction rate. (Sections 5152(b)(1), 5153(b)(1).)

With respect to the last ground, early drafts of the drug-free workplace legislation allowed the suspension of federal funds following the conviction of a single employee. The final version, however, substitutes a more flexible, less precise formulation: sanctions can be levied only if "such a number of employees . . . have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the [contractor or grantee] has failed to make a good faith effort to provide a drug-free workplace. . . ." How many is "such a number"? OMB studiously refrains from answering: "This is a standard that must be applied . . . on a case-by-case

basis. The facts and circumstances of . . . employee drug problems vary so much that it would be virtually impossible to prescribe an across-the-board standard for how many convictions it would take before an agency would find a grantee [or contractor] in violation." (54 Fed. Reg. at 4949.)[10]

The Act establishes a multi-step procedure for the imposition of sanctions, starting with a written finding by the head of the funding agency (or designee) that the recipient has violated the terms of its certification. The written finding specifies an appropriate sanction, either mild or severe.

A *mild* sanction (termination of the contract or grant or suspension of payments under the contract or grant) affects only that contract or grant. It has no repercussions on other awards or on the recipient's eligibility for new awards. By contrast, a *severe* sanction (suspension or debarment) immediately jeopardizes the recipient's eligibility for future awards from any federal source.[11] A "severe" sanction recommendation triggers a standard administrative proceeding. The proceeding, however, is relatively informal, and does not

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10. One conundrum is worth noting. The Act requires employees to notify the employer in case of conviction for workplace-related drug crimes, but imposes no independent policing or monitoring requirement on employers. Employers are required to notify their funding agencies of employee convictions, but only when the employee discloses the conviction or the employer receives "actual notice" of conviction. In determining whether the number of employee convictions is large enough to warrant a sanction, could the federal funding agency include convictions of which the employer did *not* have actual notice? Is it conceivable that the ratio of reported to unreported convictions could become one of the "facts and circumstances" on which the government would rely in determining an appropriate sanction? If the government really intends to develop a common law of enforcement through "case-by-case" adjudication, then we are probably years away from knowing the answers to these and other enforcement questions.

11. *Debarment* prohibits receipt of contracts or grants from any federal funding agency for a specified period. Under other circumstances, the term of debarment cannot exceed three years; but under a special provision in the Drug-Free Workplace Act, the maximum debarment term can be extended to five years for violations of the Act (sections 5152(b)(3), 5153(b)(3)). *Suspension* is in essence a temporary form of debarment. Suspensions remain in effect either for twelve months or until completion of debarment proceedings, whichever is shorter.

guarantee the right to an evidentiary hearing.[12]

Section 5155 of the Act contains complex provisions allowing the agency head to waive sanctions under certain circumstances. Some of the complexity is due to the fact that the waiver standard is different for contractors and grantees. A sanction against a contractor can be waived only if the imposition of the sanction would "severely disrupt the operation of [the funding] agency to the detriment of the Federal Government or the general public. . . ." For grantees, the waiver standard is more permissive: a sanction may be waived if its imposition would "not be in the public interest."

The waiver section draws another distinction between contracts and grants: a contractor cannot apply for a waiver until "after the issuance of a final determination" (meaning, presumably, after completion of agency suspension and debarment proceedings), while a grantee can apply preemptively for waiver at any time, even before the sanction is imposed.[13]

The Department of Defense Rule on The "Drug-Free Work Force"

Legally, historically, and philosophically, the DOD rule is distinct from the anti-drug legislation enacted in 1988. It was promulgated almost two months before enactment of the Drug-Free Workplace Act. For Pentagon contractors, the DOD rule *supplements* the Act and implementing regulations; it does not *substitute* for them. In other words, a college or university that applies for defense contracts must comply with both the Drug-Free Workplace Act (and implementing regulations) and

12. "Debarment and Suspension," Exec. Order No. 12549, 3 C.F.R. ¶ 189 (1986), *reprinted in* 1986 U.S. CODE CONG. & AD. NEWS B13. The government-wide debarment and suspension procedures do not vary from agency to agency. For a representative procedure, see 29 C.F.R. Part 98 (1988) (Dep't of Labor).

13. As is true for so many of the Act's enforcement provisions, the waiver section leaves tantalizing issues unresolved. A decision by one federal agency to debar a recipient affects all other agencies, but the decision by an agency head to waive a sanction presumably extends no farther than the waiving agency. If a university were debarred, would it have to apply separately to each federal funding agency for a waiver?

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the DOD rule, at least to the extent that its contracting activities fall within the relatively narrow scope of the DOD rule.

Commentators have been quick to point out that the Defense Department's choice of a distinctive noun in the title and text of its rules assumes more than symbolic significance. Congress passed the Drug-Free *Workplace* Act to reduce the impact of drug abuse on workplace efficiency. The DOD rule, by contrast, aims to achieve the more ambitious goal of a "Drug-Free *Work Force*" by prohibiting the use of illegal drugs "on or off duty" and mandating employee drug testing under certain circumstances—testing aggressively designed to detect any kind of illegal drug use, including after-hours or recreational use bearing no relationship to an employee's duties in the workplace.

In operational terms, the DOD rule is actually an amendment to the Defense Department's procurement regulations. It applies to two categories of Pentagon procurement contracts:

- "[C]ontracts involving access to classified information"; and
- Any other contract when the contracting officer determines that inclusion of the prescribed contract language is necessary "for reasons of national security or for the purpose of protecting the health or safety of those" affected by the performance of the contract. (53 Fed. Reg. 37763, 37764 (Sept. 28, 1988).)[14]

If the contracting officer determines that a particular contract is covered by the DOD rule, then a standard-form "drug-free work force" clause is inserted in the solicitation and contract. The clause broadly requires the contractor to "institute and maintain a program for achieving the objective of a drug-free work force," and specifies the four minimum components for such a program.

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14. Unlike section 5152 of the Drug-Free Workplace Act, which applies only to contracts that equal or exceed $25,000, the DOD rule applies to all contracts, regardless of dollar amount, that are otherwise covered by the rule.

First, the contractor must establish an employee assistance program that emphasizes counseling, education, rehabilitation, and coordination with available community resources. This presumably duplicates the "drug-free awareness program" requirement in section 5152(a)(1)(B) of the Drug-Free Workplace Act, with which, of course, the contractor must also comply (if the contract is for $25,000 or more).

Second, the contractor must provide training to supervisory personnel to assist in identifying and addressing illegal drug use by employees.

Third, the contractor's program must include a mechanism for referring individual employees for treatment. The mechanism must include both self-referral and supervisory referral. The reference in the DOD rule to supervisory referral represents a potentially significant addition to the requirements in the Drug-Free Workplace Act. Under the Act, the only employee who can be compelled to participate in a treatment program is one convicted of a drug-related, work-related crime. The DOD rule would allow the contractor to condition the continued employment of any employee (even one who had never tested positive for drug use or been convicted of a drug-related crime) on compulsory participation in a treatment program.

Fourth and finally, the contractor must institute an employee drug testing program. This is clearly the most controversial provision in the DOD rule, and not surprisingly it is also the longest and most complicated, consuming ten of the eighteen paragraphs in the mandatory contract clause. The drug-testing provision begins with a definition of a special category of employee:

> "Employee in a sensitive position" . . . means an employee who has been granted access to classified information; or employees in other positions that the contractor determines involve national security, health or safety, or functions other than the foregoing requiring a high degree of trust or confidence. [53 Fed. Reg. at 37765.]

The contractor *must* establish a testing program for employees in sensitive positions. (The

DOD rule does not stipulate details for such a program or frequency of testing. Nor does it require that all employees in sensitive positions be tested, leaving decisions on the "extent of and criteria for such testing" to the contractor.) The contractor *may*, in addition, extend the testing program to other, nonsensitive employees whose conduct gives rise to a reasonable suspicion of illegal drug use (for example, employees involved in accidents or discharged from rehabilitation programs) and any employees who agree voluntarily to submit to drug testing. In addition, the contractor may establish a pre-employment drug testing program for job applicants.[15]

Any employee who tests positive must be removed immediately from duty "until such time as the contractor, in accordance with [its own] procedures. . . , determines that the employee may" return to work. (53 Fed. Reg. at 37765.) The DOD rule, unlike the Drug-Free Workplace Act, draws no distinction between drug-related activity on the job and drug use away from the job. Under the DOD rule, *any* illegal drug use, if detected by a drug test, results automatically in removal from duty.[16]

Unlike the Act, the DOD rule does not specify particular sanctions for contractors

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15. Any pre-employment screening test would have to be conducted in accordance with generic federal standards. *See generally* "Mandatory Guidelines for Federal Workplace Drug Testing Programs," 53 Fed. Reg. 11970 (April 11, 1988).

16. The drug-testing provisions in the DOD rule prompt one concluding comment.

The DOD rule was originally published in the Federal Register on September 28, 1988, as an interim rule, causing some to speculate that DOD might make changes in the drug-testing provisions in the final version depending on the outcome of two pivotal cases then pending in the Supreme Court (see note 19, *infra*).

Those Supreme Court cases, decided in March, 1989, affirmed the constitutionality under some circumstances of random employee drug testing. The Defense Department almost immediately issued a set of "Questions and Answers" purporting to clarify the drug-testing provisions in the Drug-Free Work Force Rule. "Q&A Prepared by Department of Defense on DOD's Interim Drug-Free Workforce Rule," *reprinted in* [BNA] *Fed. Contracts Rep't.*, Vol. 51, No. 15, at 712–713 (April 10, 1989). The Defense Department appears to view the two Supreme Court decisions as support for the constitutionality of the random drug testing program enunciated in the interim rule.

As of the 1989 Memorial Day weekend, when this pamphlet was sent to press, DOD had neither republished the interim rule in final form nor indicated definitively

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who violate the terms of the mandatory contract clause. Presumably, breach of the "drug-free work force" clause would be treated like any other breach of a Pentagon procurement contract, subjecting the contractor to termination, suspension, or debarment under standard administrative procedures.[17]

Finally, the DOD rule contains an important savings clause. The last paragraph of the rule makes the drug-testing provisions inapplicable to the extent that those provisions are "inconsistent with state or local law, or with an existing collecting bargaining agreement. . . ."[18] Given the enormous uncertainty that currently surrounds the constitutionality of employee drug testing, this clause may loom important in the months ahead.[19]

Conclusion

The Drug-Free Workplace Act is less than what many colleges and universities feared a year ago. The DOD Drug-Free Work Force rule, on the other hand, may prove to be more troublesome than many expected, particularly if it presages more intrusive regulation in the years ahead.

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whether or when it intended to do so. If the rule is eventually republished in amended form, it seems relatively safe to predict that the drug-testing provisions in the final version will not be *less* sweeping than what DOD has already included in the interim rule; they may, in fact, be more sweeping. All attorneys who read this pamphlet should determine whether DOD has issued a final rule that supersedes the version analyzed herein; that can be done by telephoning the Office of the Assistant General Counsel for Logistics in the Pentagon at (202) 697-6921.

17. These procedures are contained in Part 9, Subpart 9.4 (suspension and debarment) and Part 49, Subpart 49.4 (termination for default) of the Federal Acquisition Regulations, 48 C.F.R. Chap. 1 (1988).

18. If drug testing is prohibited under the terms of a collective bargaining agreement, then the contractor must raise the subject of drug testing at the next collective bargaining session. (53 Fed. Reg. at 37765.)

19. For good general introductions to the thicket of legal and practical questions surrounding employee drug testing, see Note, *Employee Drug Testing—Balancing the Interests in the Workplace: A Reasonable Suspicion Standard*, 74 VA.L.REV. 969 (1988); Symposium: Drug Testing, 36 U.KAN.L.REV. 641 (1988). *See also Skinner v. Railway Labor Executives' Ass'n*, 57 U.S.L.W. 4324 (U.S. March 21, 1989); *Nat'l Treasury Employees Union v. von Raab*, 57 U.S.L.W. 4338 (U.S. March 21, 1989) (the Supreme Court's latest pronouncements on the constitutional standards for drug testing).

The counseling and educational programs mandated by the Drug-Free Workplace Act pose few serious problems for American colleges and universities, almost all of which had instituted drug awareness programs by the mid-1980s. Drug testing, however, poses an entirely different set of legal concerns and compliance problems. The task of designing an involuntary drug testing program is formidably difficult on many different levels. It is fraught with legal pitfalls. It poses practical problems concerning the collection of specimens and the supervision and reliability of independent testing laboratories. And it is unavoidably emotional, provoking confrontations with labor unions and inevitable threats of litigation. College and university attorneys enter this minefield unarmed and ill-prepared. With the exception of very small compulsory drug testing programs for student athletes participating in intercollegiate competition sponsored by the National Collegiate Athletic Association, there are virtually no drug testing programs on American college and university campuses today.

Yet drug testing is probably with us to stay. As the drug scourge worsens, courts seem more willing to sanction random drug testing and elected representatives continue to tout it as the most effective way of controlling drug abuse. The Drug-Free Workplace Act of 1988 may not be Congress's last word on the prevention of drug abuse by American workers. As long as colleges and universities accept federal funds, they will not be insulated from the politics of the war on drugs. They should expect that war to intensify before Congress declares a winner and decommissions the troops.

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APPENDIX

Subtitle D—Drug Free Workplace Act of 1988

SEC. 5151. SHORT TITLE.

This subtitle may be cited as the "Drug-Free Workplace Act of 1988".

SEC. 5152. DRUG-FREE WORKPLACE REQUIREMENTS FOR FEDERAL CONTRACTORS.

This section, which applies to contractors, exactly parallels the next section, which applies to grantees.

(a) DRUG-FREE WORKPLACE REQUIREMENT.—

(1) REQUIREMENT FOR PERSONS OTHER THAN INDIVIDUALS.—No person, other than an individual, shall be considered a responsible source, under the meaning of such term as defined in section 4(8) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(8)), for the purposes of being awarded a contract for the procurement of any property or services of a value of $25,000 or more from any Federal agency unless such person has certified to the contracting agency that it will provide a drug-free workplace by—

(A)–(G) are the specific compliance requirements.

(A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(B) establishing a drug-free awareness program to inform employees about—

(i) the dangers of drug abuse in the workplace;

(ii) the person's policy of maintaining a drug-free workplace;

(iii) any available drug counseling, rehabilitation, and employee assistance programs; and

(iv) the penalties that may be imposed upon employees for drug abuse violations;

(C) making it a requirement that each employee to be engaged in the performance of such contract be given a copy of the statement required by subparagraph (A);

(D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment on such contract, the employee will—

(i) abide by the terms of the statement; and

(ii) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction;

(E) notifying the contracting agency within 10 days after receiving notice under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction;

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(F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 5154; and

(G) making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F).

(2) REQUIREMENT FOR INDIVIDUALS.—No Federal agency shall enter into a contract with an individual unless such contract includes a certification by the individual that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract.

Subsection (b) is the sanction provision.

(b) SUSPENSION, TERMINATION, OR DEBARMENT OF THE CONTRACTOR.—

(1) GROUNDS FOR SUSPENSION, TERMINATION, OR DEBARMENT.—Each contract awarded by a Federal agency shall be subject to suspension of payments under the contract or termination of the contract, or both, and the contractor thereunder or the individual who entered the contract with the Federal agency, as applicable, shall be subject to suspension or debarment in accordance with the requirements of this section if the head of the agency determines that—

Grounds for imposing a sanction.

(A) the contractor or individual has made a false certification under subsection (a);

(B) the contractor violates such certification by failing to carry out the requirements of subparagraph (A), (B), (C), (D), (E), or (F) of subsection (a)(1); or

(C) such a number of employees of such contractor have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace as required by subsection (a).

(2) CONDUCT OF SUSPENSION, TERMINATION, AND DEBARMENT PROCEEDINGS.—(A) If a contracting officer determines, in writing, that cause for suspension of payments, termination, or suspension or debarment exists, an appropriate action shall be initiated by a contracting officer of the agency, to be conducted by the agency concerned in accordance with the Federal Acquisition Regulation and applicable agency procedures.

(B) The Federal Acquisition Regulation shall be revised to include rules for conducting suspension and debarment proceedings under this subsection, including rules providing notice, opportunity to respond in writing or in person, and such other procedures as may be necessary to provide a full and fair proceeding to a con-

tractor or individual in such proceeding.

(3) EFFECT OF DEBARMENT.—Upon issuance of any final decision under this subsection requiring debarment of a contractor or individual, such contractor or individual shall be ineligible for award of any contract by any Federal agency, and for participation in any future procurement by any Federal agency, for a period specified in the decision not to exceed 5 years.

SEC. 5153. DRUG-FREE WORKPLACE REQUIREMENTS FOR FEDERAL GRANT RECIPIENTS

(a) DRUG-FREE WORKPLACE REQUIREMENT.—

(1) PERSONS OTHER THAN INDIVIDUALS.—No person, other than an individual, shall receive a grant from any Federal agency unless such person has certified to the granting agency that it will provide a drug-free workplace by—

(A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(B) establishing a drug-free awareness program to inform employees about—

(i) the dangers of drug abuse in the workplace;

(ii) the grantee's policy of maintaining a drug-free workplace;

(iii) any available drug counseling, rehabilitation, and employee assistance programs; and

(iv) the penalties that may be imposed upon employees for drug abuse violations;

(C) making it a requirement that each employee to be engaged in the performance of such grant be given a copy of the statement required by subparagraph (A);

(D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment in such grant, the employee will—

(i) abide by the terms of the statement; and

(ii) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction;

(E) notifying the granting agency within 10 days after receiving notice of a conviction under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction;

(F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 5154; and

(G) making a good faith effort to con-

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tinue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F).

(2) INDIVIDUALS.—No Federal agency shall make a grant to any individual unless such individual certifies to the agency as a condition of such grant that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in conducting any activity with such grant.

(b) SUSPENSION, TERMINATION, OR DEBARMENT OF THE GRANTEE.—

(1) GROUNDS FOR SUSPENSION, TERMINATION, OR DEBARMENT.—Each grant awarded by a Federal agency shall be subject to suspension of payments under the grant or termination of the grant, or both, and the grantee thereunder shall be subject to suspension or debarment, in accordance with the requirements of this section if the agency head of the granting agency or his official designee determines, in writing, that—

(A) the grantee has made a false certification under subsection (a);

(B) the grantee violates such certification by failing to carry out the requirements of subparagraph (A), (B), (C), (D), (E), (F), or (G) or subsection (a)(1); or

(C) such a number of employees of such grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace as required by subsection (a)(1).

(2) CONDUCT OF SUSPENSION, TERMINATION, AND DEBARMENT PROCEEDINGS.—A suspension of payments, termination, or suspension or debarment proceeding subject to this subsection shall be conducted in accordance with applicable law, including Executive Order 12549 or any superseding Executive order and any regulations promulgated to implement such law of Executive order.

(3) EFFECT OF DEBARMENT.—Upon issuance of any final decision under this subsection requiring debarment of a grantee, such grantee shall be ineligible for award of any grant from any Federal agency and for participation in any future grant from any Federal agency for a period specified in the decision, not to exceed 5 years.

SEC. 5154. EMPLOYEE SANCTIONS AND REMEDIES.

A grantee or contractor shall, within 30 days after receiving notice from an employee of a conviction pursuant to section 5152(a)(1)(D)(ii) or 5153(a)(1)(D)(ii)—

(1) take appropriate personnel action against such employee up to and including termination; or

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(2) require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

SEC. 5155. WAIVER.

(a) IN GENERAL.—A termination, suspension of payments, or suspension or debarment under this subtitle may be waived by the head of an agency with respect to a particular contract or grant if—

(1) in the case of a waiver with respect to a contract the head of the agency determines under section 5152(b)(1), after the issuance of a final determination under such section, that suspension of payments, or termination of the contract, or suspension or debarment of the contractor, or refusal to permit a person to be treated as a responsible source for a contract as the case may be, would severely disrupt the operation of such agency to the detriment of the Federal Government or the general public; or

(2) in the case of a waiver with respect to a grant the head of the agency determines that suspension of payments, termination of the grant, or suspension or debarment of the grantee would not be in the public interest.

(b) EXCLUSIVE AUTHORITY.—The authority of the head of an agency under this section to waive a termination, suspension, or debarment shall not be delegated.

SEC. 5156. REGULATIONS.

Not later than 90 days after the date of enactment of this subtitle, the government-wide regulations governing actions under this subtitle shall be issued pursuant to the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.).

SEC. 5157. DEFINITIONS.

For purposes of this subtitle—

(1) the term "drug-free workplace" means a site for the performance of work done in connection with a specific grant or contract described in section 5152 or 5153 of an entity at which employees of such entity are prohibited from engaging in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in accordance with the requirements of this Act;

(2) the term "employee" means the employee of a grantee or contractor directly engaged in the performance of work pursuant to the provisions of the grant or contract described in section 5152 or 5153;

(3) the term "controlled substance" means a controlled substance in schedules

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I through V or section 202 of the Controlled Substances Act (21 U.S.C. 812);

(4) the term "conviction" means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(5) the term "criminal drug statute" means a criminal statute involving manufacture, distribution, dispensation, use, or possession of any controlled substance;

(6) the term "grantee" means the department, division, or other unit of a person responsible for the performance under the grant;

(7) the term "contractor" means the department, division, or other unit of a person responsible for the performance under the contract; and

(8) the term "Federal agency" means an agency as that term is defined in section 552(f) of title 5, United States Code.

SEC. 5158. CONSTRUCTION OF SUBTITLE.

Nothing in this subtitle shall be construed to require law enforcement agencies, if the head of the agency determines it would be inappropriate in connection with the agency's undercover operations, to comply with the provisions of this subtitle.

SEC. 5159. REPEAL OF LIMITATION ON USE OF FUNDS.

Section 628 of Public Law 100-440 (relating to restrictions on the use of certain appropriated amounts) is amended—

(1) by striking "(a)" after "SEC. 628."; and

(2) by striking subsection (b).

SEC. 5160. EFFECTIVE DATE.

Sections 5152 and 5153 shall be effective 120 days after the date of the enactment of this subtitle.

The Department of Defense "Drug-Free Work Force" Interim Rule

(53 Fed. Reg. 37763, Sept. 28, 1988)

Drug-Free Work Force (Sep 1988)

(a) Definitions. "Illegal drugs," as used in this clause, means controlled substance included in Schedule I and II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under Chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized

"Employee in a sensitive position," as used in this clause, means an employee who has been granted access to classified information; or employees in other positions that the contractor determines involve national security, health or safety, or functions other than the foregoing requiring a high degree of trust and confidence.

(b) The Contractor agrees to institute and maintain a program for achieving the objective of a drug-free work force. While this clause defines criteria for such a program, Contractors are encouraged to implement alternative approaches comparable to the criteria in paragraph (c) below that are designed to achieve the objectives of this clause.

(c) Contractor programs shall include the following, or appropriate alternatives:

(1) Employee assistance programs emphasizing high level direction, education, counseling, rehabilitation, and coordination with available community resources;

(2) Supervisory training to assist in identifying and addressing illegal drug use by Contractor employees;

(3) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues;

(4) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis. Employee drug testing programs shall be established taking account of the following:

Drug testing.

(i) The Contractor shall establish a program that provides for testing for the use of illegal drugs by employees in sensitive positions. The extent of and criteria for such testing shall be determined by the Contractor based on considerations that include the nature of the work being performed under the contract, the employee's duties, the efficient use of Contractor resources, and the risks to public health, safety, national security that could result

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from the failure of an employee adequately to discharge his or her position.

(ii) In addition, the Contractor may establish a program for employee drug testing—

(A) When there is a reasonable suspicion that an employee uses illegal drugs; or

(B) When an employee has been involved in an accident or unsafe practice;

(C) As part of or as a follow-up to counseling or rehabilitation for illegal drug use;

(D) As part of a voluntary employee drug testing program.

(iii) The Contractor may establish a program to test applicants for employment for illegal drug use.

(iv) For the purpose of administering this clause, testing for illegal drugs may be limited to those substances for which testing is prescribed by section 2.1 of Subpart B of the "Mandatory Guidelines for Federal Workplace Drug Testing Programs," (53 FR 11960 (April 11, 1988)), issued by the Department of Health and Human Services.

(d) Contractors shall adopt appropriate personnel procedures to deal with employees who are found to be using drugs illegally. Contractors shall not allow any employee to remain on duty or perform in a sensitive position who is found to use illegal drugs until such time as the contractor, in accordance with procedures established by the contractor, determines that the employee may perform in such a position.

(e) The provisions of this clause pertaining to drug testing programs shall not apply to the extent they are inconsistent with state or local law, or with an existing collective bargaining agreement; provided that with respect to the latter, the Contractor agrees that those issues that are in conflict will be a subject of negotiation at the next collective bargaining session.

Selected Resources on the Drug-Free Workplace Act and Related Topics

Articles, Reports, Background Papers

Hogan and Hartson. "The Impact of the Drug-Free Workplace Act and Related Federal Anti-Drug Rules on Colleges and Universities." Washington, D.C.: Hogan and Hartson, April 1989.

Kelly, J. J. and Madsen, M. G. *Federal Legislation and Regulations for a Drug-Free Workplace*. Prepared for and available from the American Council on Education, Washington, D.C., November 1988.

National Association of College and University Business Officers. *Special Action Report 89-4: Drug-Free Workplace Requirements*. Washington, D.C.: National Association of College and University Business Officers, March 1, 1989.

Savage, Frederick G. "Controlling Substance Abuse by University Employees: Important Legislative and Judicial Developments." NACUA Outline, 1989 Annual Conference.*

Silbergeld, Arthur F. "Federal Contracts Must Keep Work Place Free of Illegal Drugs." *The National Law Journal*, January 16, 1989, pp. 18–20.

Institutional Policies*

Northwestern University (IL). *Statement on a Drug-Free Workplace*.

University of Virginia. *Drug-Free Workplace: Policy Statement and Program Description*.

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*These are available from the Legal Reference Service at NACUA.

Also Available From NACUA

Crime on Campus: Institutional Tort Liability for the Criminal Acts of Third Parties, by Anita D. Raddatz. $6.00 each prepaid.

College and University Student Records: A Legal Compendium, edited by Joan E. Van Tol. $25.00 each prepaid.

Sexual Harassment on Campus: A Legal Compendium, edited by Joan E. Van Tol. $25.00 each prepaid.

Student Legal Issues, selected articles from *The Journal of College and University Law*, edited by Elsa Kircher Cole and Barbara L. Shiels. $19.50 each prepaid.

Legal Issues in Faculty Employment, selected articles from *The Journal of College and University Law*, edited by Patricia Eames and Thomas P. Hustoles. $25.00 each prepaid.

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